

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
EASTERN DIVISION**

STATES OF WEST VIRGINIA,
NORTH DAKOTA, GEORGIA, and
IOWA, *et al.*,

Plaintiffs,

and

CASS COUNTY FARM BUREAU, *et al.*,

Intervenor-Plaintiffs,

V.

U.S. ENVIRONMENTAL PROTECTION
AGENCY, *et al.*,

Defendants,

and

CHICKALOON VILLAGE TRADITIONAL
COUNCIL, *et al.*,

Defendant-Intervenors.

Civil No. 3:23-cv-0032

**PLAINTIFF STATES AND INTERVENOR-PLAINTIFFS’
MOTION FOR LEAVE TO FILE SURREPLY**

Plaintiff States and Intervenor-Plaintiffs move for leave to file the surreply attached as **Exhibit A** in opposition to Defendants’¹ motions for summary judgment (Dkts. 208, 209) and in support of their own motions for summary judgment (Dkts. 198, 201). The proposed surreply is narrowly limited to addressing relevant judicial decisions and agency memoranda that were either (1) issued on the same day or after Plaintiff States and Intervenor-Plaintiffs filed their reply/cross-response briefs on June 25, 2024 (Dkts. 216, 218), or (2) were issued shortly before Plaintiff States’ and Intervenor-Plaintiffs’ reply/cross-response briefs so that Plaintiff States and Intervenor-Plaintiffs have not had the opportunity to address Defendants’ arguments regarding that authority that appeared for the first time in Defendants’ reply briefs supporting their summary judgment motions. (Dkts. 221, 222). In support of this motion, Plaintiff States and Intervenor-Plaintiffs state as follows:

DISCUSSION

Local Rule 7.1(C) provides that parties “must serve and file a motion to obtain leave of court to submit any additional filings.” L.R. 7.1(C). Further, a party filing a motion for leave “must file the proffered pleading as an attachment.” L.R. 5.1(C). Defendants filed their respective motions for summary judgment on April 26, 2024. (Dkts. 208, 209). Plaintiff States and Intervenor-Plaintiffs filed their response briefs on June 25, 2024 (Dkts. 216, 218). Defendants filed their respective reply briefs on July 25 and July 26, 2024 (Dkts. 221, 222).

Plaintiff States and Intervenor-Plaintiffs request leave to file a surreply to address relevant judicial decisions and agency actions that occurred after or close in time to when Plaintiff States and Intervenor-Plaintiffs filed their reply/cross-response briefs on June 25, 2024. Specifically, the

¹ Defendants are (1) the U.S. Environmental Protection Agency and Army Corps of Engineers (together, the “Agencies”) and (2) Chickaloon Village Traditional Council, Rappahannock Tribe, Tohono O’odham Nation, and White Earth Band of Ojibwe (“Defendant-Intervenors”).

proposed surreply will address (1) the Supreme Court’s June 28, 2024 decision in *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024), cited at page 12 n.1 of the Agencies’ reply brief (Dkt. 222); (2) the Eastern District of North Carolina’s decision in *White v. U.S. EPA*, 2024 WL 3049581 (E.D.N.C. June 18, 2024), *appeal pending*, cited at pages 11-13 and 18-24 of the Agencies’ reply brief and at pages 3-6 of the Defendant-Intervenors’ reply brief; and (3) Agency memoranda issued June 25, 2024, that demonstrate the improper overreach of the Agencies’ post-*Sackett* approach to finding jurisdiction over wetlands.² This motion is not made for purposes of delay, but to provide as complete and accurate a record as possible for an informed resolution of the parties’ cross-motions for summary judgment. No prejudice or undue delay would result from granting this motion for leave, as the motions for summary judgment remain outstanding. And by filing a combined surreply, Plaintiff States and Intervenor-Plaintiffs have sought to address these issues as efficiently as possible.

The Agencies and Defendant-Intervenors oppose this motion.

The two judicial decisions addressed in the proposed surreply were decided before Defendants filed their reply briefs and were in fact addressed by Defendants in those briefs. First, the Agencies, having relied on *Chevron* deference in their motion for summary judgment, withdrew that request in their reply, citing the recently issued *Loper Bright* decision. (See Dkt. 222 at 12 n.1). As opposed to Defendants, who filed their reply briefs having the benefit of a month to consider *Loper Bright*, Plaintiff States and Intervenor-Plaintiffs have not had the opportunity to brief the Court on how the Amended Rule should be scrutinized under the framework set forth in *Loper Bright*. Second, the Agencies discuss the *White* decision for the first time in ten pages of their reply brief (Dkt. 222 at 11-13 and 18-24), and the Defendant-Intervenors discuss *White* on

² Each of the judicial decisions and agency actions are attached as appendices to the proposed surreply.

four pages (Dkt. 221 at 3-6). Plaintiff States and Intervenor-Plaintiffs have not had the opportunity to address those new arguments. Plaintiff States did not address the ruling in *White* in their reply brief, decided only seven days prior, while the Intervenor-Plaintiffs addressed it only in a footnote. Thus, this Court has not yet had the benefit of full discussion of this case, on which Defendants put so much reliance. Third, the Agency memoranda cited in the proposed surreply are relevant to the issues raised in the summary judgment motions but were not issued by the Agencies until sometime on June 25, 2024, the date Plaintiff States and Intervenor-Plaintiffs filed their reply briefs.

Plaintiff States and Intervenor-Plaintiffs therefore respectfully request that the Court grant this motion and consider the arguments and authorities set forth in the surreply attached hereto as **Exhibit A** in deciding the motions for summary judgment.

Dated: August 16, 2024

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CERTIFICATE OF CONFERENCE

The undersigned hereby certifies that on August 15-16, 2024, counsel for Intervenor-Plaintiffs conferred with counsel for Defendants and Intervenors regarding the requested relief, who confirmed that they are opposed to the relief sought herein.

/s/ Michael R. Williams

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